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THE LAW AND THE LYNCHERS.

BY GEORGE TICKNOR CURTIS.

The first question submitted to me by the editor of *THE NORTH AMERICAN REVIEW* is in the following words :

“Suppose that the State of Louisiana were to pass a law banishing all Italians from her territory after thirty days ; what remedy would the United States government have, if any ? and how would the United States government then be able to maintain its treaty obligations with Italy ?”

No State in this Union can banish from its territory any foreigners who are residents or travellers therein, and whom the government of the United States has permitted to come into the country, whether there is or is not a subsisting treaty between the United States and the nation to which such foreigners belong, guaranteeing protection to the citizens or subjects of each country in the dominions of the other. The law of nations is a part of the law of every civilized country, and it obliges every civilized government to protect the persons and property of foreigners who are within its limits. Such foreigners pay all taxes that are levied on them, and are bound to obey the laws. Owing a qualified and temporary allegiance to the country in which they are, they are entitled to its protection. Many governments have compelled semi-civilized or barbarian nations to atone for wrongs and injuries done to their subjects or citizens.* If such a bill as

*Grotius mentions a Scythian tribe, the Taurians, who sacrificed strangers to Diana. He maintains that all other nations had a right to unite together to chastise them. General Jackson, when President, sent a naval force, which summarily demolished a whole town of similar barbarians who had treated some of our countrymen in the same manner. These barbarians had a regular government ; but I believe it was never ascertained that the murder of the “*Friendship's*” crew was an act of that government ; it was done by a handful of irresponsible savages—what in a civilized country is called a mob. But the walls of Quallah Battoo had to fall for it, notwithstanding.

is suggested were to be introduced into the Legislature of Louisiana, it would be the duty of the government of the United States to remonstrate against it, and prevent its passage if possible. If it were to be passed, it would be the duty of our national government to cause it to be judicially declared to be unconstitutional, by taking up and prosecuting the case of one or more of the foreigners banished from the State. Such a State law could never be enforced.

I will now answer the remainder of the inquiries by stating the substance of the positions taken in Mr. Blaine's letter of April 14 to the Marquis Imperiali, and will give the reasons why I consider Mr. Blaine's positions as entirely sound. His letter is one of the ablest and clearest despatches I have ever read. It is eminently creditable to our diplomacy and to Mr. Blaine himself. He holds first that the State of Louisiana is bound to punish the individual rioters who murdered the Italian subjects in New Orleans, and that the United States cannot punish them criminally. Murder, whether of a foreigner or of a citizen, committed on the soil of a State, and not within the admiralty and maritime jurisdiction of the United States, is a crime cognizable only in the courts of the State. I know of no way in which an indictment for this murder of Italian subjects committed in New Orleans could be framed in the name of the United States and made cognizable in a Federal court.

The editor observes that "Mr. Blaine has committed himself to the view that the Federal government can do nothing toward punishing the New Orleans mob leaders, though Mr. William Henry Hurlbert insists that article 3 of the constitution makes it possible for the Federal government to try such offenders in a Federal or United States court." I agree with Mr. Blaine, and I differ from Mr. Hurlbert. Under article 3 of the constitution the judicial power of the United States does not extend, and, in my opinion, cannot be made by Congress to extend, to the cases of the individuals who killed the Italians. It is true that the judicial power extends to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority. "Cases arising under treaties" are those in which some party other than the United States has a controversy with another party, capable of judicial determination,

and requiring for its adjudication an interpretation of a treaty. Cases arising in the execution of a treaty between the United States and a foreign nation are not within the judicial power, for the reason that they are cognizable only in the department of our government which holds and exercises the treaty-making power. Italy now has a controversy with the United States, which is whether some of the subjects of Italy have had in this country the protection which the treaty guaranteed to them. This is a controversy between nation and nation. It is cognizable only in the diplomatic department of our government. The difficulty with legislation which should now undertake to make this offence cognizable in the judicial department of the Federal government would be twofold : first, as to these past cases it would be an *ex-post-facto* law ; secondly, as to future cases there would be no basis for the jurisdiction.

The United States have no common law. Crimes against the United States which can be made cognizable in a Federal court are such offences as have been made crimes or misdemeanors by some Federal statute. In the case supposed the indictment would charge that an offence had been committed against the United States by citizens of New Orleans, whereas there is no law of the United States which has made it an offence against the United States to kill a foreigner who is under the protection of a treaty. The power of Congress to pass a law for the special protection of United States officers when in the discharge of their duty—which was suggested by the attack made by Terry on Mr. Justice Field in California—is a very different matter. The treaty with Italy itself determines what protection is under it. It casts on every State in the Union the duty of so administering its laws as to punish individuals who on the soil of the State injure Italian subjects in their persons or property. It casts on the United States the duty of indemnifying the families of the murdered persons for the loss of their lives. Mr. Blaine has, in my opinion, clearly defined the obligations which the treaty did or did not impose on the government of the United States. He says :

“The United States did not by the treaty with Italy become the insurer of the lives or property of Italian subjects resident within our territory. No government is able, however high its civilization, however vigilant its police supervision, however severe its criminal code, and however prompt and inflexible its criminal administration, to secure its own citizens against violence promoted by individual malice or by sudden popular tumult. The for-

foreign resident must be content in such cases to share the same redress that is offered by the law to the citizen, and has no just cause of complaint or right to ask the interposition of his country if the courts are equally open to him for the redress of his injuries.

"The treaty, in the first, second, third, and notably in the twenty-third, articles, clearly limits the rights guaranteed to the citizens of the contracting powers in the territory of each to equal treatment and to free access to the courts of justice. Foreign residents are not made a favored class. It is not believed that Italy would desire a more stringent construction of her duty under the treaty. Where the injury inflicted upon a foreign resident is not the act of the government or of its officers, but of an individual or of a mob, it is believed that no claim for indemnity can justly be made unless it shall be made to appear that the public authorities charged with the peace of the community have connived at the unlawful act, or, having timely notice of the threatened danger, have been guilty of such gross negligence in taking the necessary precautions as to amount to connivance."

I have carefully examined the texts of the treaty to which Mr. Blaine refers, and I have no doubt about the rule by which they ought to be interpreted. They should be interpreted with reference to the general principles of the law of nations, with reference to other treaties of the like kind which we have with other nations, and with reference to our complex form of government. What the general principles of international law on this subject are I have already stated. We have many similar treaties with other nations besides Italy, and some of them have subsisted for a long time. They are all framed in accordance with the general principles of public law, and they are evidence of what the public law is on this subject.

Now, in regard to the peculiarities of our form of government, the editor observes in his note to me that "foreign nations are inquiring with serious curiosity whether our internal relations between State and Federal powers are really such that we cannot be sure of carrying out our treaties, and no one has yet given any satisfactory pronouncement." While foreign governments are not expected to know all the niceties of our constitutional law, they are bound to know that our Federal government is one of limited powers, which are carefully defined by a written constitution.

Foreign governments were informed in the most impressive manner half a century ago by Mr. Webster, Secretary of State, that, when a State of this Union has jurisdiction over a crime committed within its limits, the government of the United States must await the action of the State authorities. In 1841 one

Alexander McLeod, a Canadian, was indicted in the State of New York for the murder of a citizen of New York, and he was held for trial. The act of McLeod was avowed by the British government to have been done by its authority as an act in defence of Canadian territory, and his surrender was demanded of the government of the United States. Instead of yielding to this demand, Mr. Webster informed the British government that, while the government of the United States admitted that the avowal of his act as done by the authority of the British government would be a good defence on the trial of the indictment, yet the United States could not prevent such a trial. He took steps, however, to furnish McLeod with proof that his act was avowed and adopted by the British government, and he sent the Attorney-General of the United States to the place of trial to watch the proceedings and to make suggestions to the counsel for McLeod. He also, by permission of the President, sent an officer of the army to the place of trial with a file of picked men in citizens' dress, with secret instructions, in case of McLeod's conviction, to take him out of the hands of the sheriff and transport him to Canada.*

Mr. Blaine is a worthy successor of the great man who was Secretary of State in 1841, and I have entire confidence in his management of our foreign relations. There is no danger whatever of a war between Italy and the United States growing out of this affair. Italy cannot demand that the United States government shall take the punishment of the murderers out of the hands of the State authorities ; and Mr. Blaine has defined with entire precision all that the United States can or ought to do. He has declared that, if it shall appear that the local authorities connived at the doings of the mob, the President will ask Congress for an appropriation of money to indemnify the families of the murdered Italians for the loss of their lives. With this Italy must be content.

GEORGE TICKNOR CURTIS.

* This last circumstance was not publicly known at the time, but it is a fact. I was informed of it by Mr. Webster years afterwards, and I was acquainted with the army officer who was intrusted with this delicate duty. The whole case and all its circumstances are described in the second volume of my life of Mr. Webster.